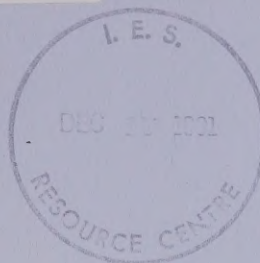


CAONCH 91C16



The Joint Board THE CONSOLIDATED HEARINGS ACT, 1981

CH-90-16

LAWGREN GROUP INC. DECISION AND REASONS FOR DECISION

IN THE MATTER OF two appeals, one by the Niagara Escarpment Commission from a decision of the Regional Municipality of Peel, Land Division Committee, whereby the Committee granted, upon conditions, an application by Mr. Vincent Flaherty to a request for a severance of two parcels of land together with an easement of Part of Lot 16 (E½), Concession 3, W.H.S., Town of Caledon, Region of Peel, to be conveyed to RNL Rodyna Holdings. The second appeal was by the Caledon Ratepayers Association and several other local residents from a decision of the Niagara Escarpment Commission, whereby the Commission approved an application, by the **Lawgren Group Inc.**, to install a well, pumphouse and approved waterline to service an approved 40-lot Plan of Subdivision in the Village of Cataract. The land conveyed to RNL Rodyna Holdings is being held in trust, by them, on behalf of Lawgren Group Inc.

BEFORE:	M.A. Rosenberg, Q.C.	-	Chairman
	Dr. P.F.J. Eagles	-	Member

DECISION DELIVERED ORALLY ON NOVEMBER 6, 1991.

ISSUED at TORONTO this 17th day of DECEMBER, 1991.

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IN THE MATTER OF Sections 2 and 3 of the *Consolidated Hearings Act, 1981*, S.O. 1981, as amended;

- and -

IN THE MATTER OF Section 52 (7) of the *Planning Act*, S.O. 1983, as amended;

- and -

IN THE MATTER OF Section 25 of the *Niagara Escarpment Planning and Development Act*, R.S.O. 1980;

- and -

IN THE MATTER OF two appeals, one by the Niagara Escarpment Commission from a decision of the Regional Municipality of Peel, Land Division Committee, whereby the Committee granted, upon conditions, an application by **Mr. Vincent Flaherty** to a request for a severance of two parcels of land together with an easement of Part of Lot 16 (E½), Concession 3, W.H.S., Town of Caledon, Region of Peel, to be conveyed to RNL Rodyna Holdings. The second appeal was by the Caledon Ratepayers Association and several other local residents from a decision of the Niagara Escarpment Commission, whereby the Commission approved an application, by the **Lawgren Group Inc.**, to install a well, pumphouse and approved waterline to service an approved 40-lot Plan of Subdivision in the Village of Cataract. The land conveyed to RNL Rodyna Holdings is being held in trust, by them, on behalf of Lawgren Group Inc.

BEFORE:	M.A. Rosenberg, Q.C.	-	Chairman
	Dr. P.F.J. Eagles	-	Member

COUNSEL:

- M.J. McQuaid - for R.N.L. Rodyna Holdings Limited and Lawgren
Bruce Engell Group Inc.
- Alison Hall - for Niagara Escarpment Commission and the
Ministry of the Environment
- Stanley Makuch - for the Caledon Ratepayers' Association

APPEARANCES:

- Nancy Mott-Allen - Planner on behalf of Caledon Ratepayers'
Association
- William Corenier - Developer on behalf of Caledon Ratepayers'
Association
- Robert Burnside - Engineer on behalf of Caledon Ratepayers'
Association
- Kenneth G. Goff - Hydrogeologist on behalf of Caledon Ratepayers'
Association
- William D. Morrison - Hydrogeologist on behalf of Caledon Ratepayers'
Association
- Ian F. MacNaughton - Planner on behalf of Caledon Ratepayers'
Association
- Jack Denreyer - Citizen on behalf of Hamlet of Cataract
- Michael Collinson - Citizen on behalf of Cataract

REASONS FOR DECISION

Decision Delivered orally by M.A. Rosenberg on November 6, 1991

Lawgren Group Inc. owns 46 acres of land adjacent to the Village of Cataract in the Town of Caledon. The Village of Cataract has 43 homes, a population of approximately 90 people and is located south of Highway 24 along the top of the bank of the Credit River.

In 1978, an Ontario Municipal Board hearing was held and the Board (otherwise constituted) approved a Draft Plan of Subdivision for 46 lots for the site. In the decision of the panel, there were 9 conditions attached to the Draft Plan of Subdivision approval, one of which said "That the piped communal water supply be approved by the Ministry of the Environment prior to issuance of any septic tank permits or the occupancy of any dwellings on the Plan". The decision of the Ontario Municipal Board was subsequently appealed to the Cabinet and in 1980 the Cabinet basically approved a Plan of Subdivision for 40 lots. Each lot would be approximately one acre in size and would contain its own septic tank.

From 1980 to 1989 the owner has gone through various other appeals relating to Niagara Escarpment matters and, in fact, has made an extensive search for water, both on and off the site. In 1989, the Niagara Escarpment Commission approved a water system for the 40 lot subdivision. This water system was located about 1 ¼ miles from the 40 lot subdivision along Highway 24. The Development Permit requested by the owner was to "install a well, pump house and approved water line to service an approved 40 lot Plan of Subdivision in the Village of Cataract". That decision was appealed to this Joint Board.

As well, the owner requested a severance on the well property and that severance application was granted by the Land Division Committee of the Region of Peel in 1990, subject to certain conditions. The severance was also appealed to the Joint Board. Both appeals were consolidated under the *Consolidated Hearings Act, 1981*.

At the opening of the Joint Board hearing on October 28, 1991 in Caledon, Ms. Alison Hall who is legal counsel for the Niagara Escarpment Commission and the Ministry of the Environment and Mr. Stanley Makuch who is legal counsel for the Caledon Ratepayers' Association, both requested an adjournment. Mr. Michael McQuaid who is legal counsel for the owner of the 46 acre property vigorously opposed the request for the adjournment.

The arguments on the motion for adjournment lasted five days. Over the five day period the Joint Board heard evidence from eight witnesses including two planners, two hydrogeologists, one engineer, the developer and two ratepayers who live in the area.

The arguments made by Ms. Hall on behalf of the Niagara Escarpment Commission and the Ministry of the Environment were as follows:

1. A request was made on October 10, 1991, to consider an adjournment due to the inadequate notice and unavailability of counsel for the Joint Board hearing. Counsel argued that there has not been enough time to prepare witnesses for a full 13 day hearing of the Joint Board.
2. The hearing is premature. The Joint Board should exercise its authority under Section 6(4) of the *Consolidated Hearings Act, 1981* to reflect other matters appropriately dealt with at this hearing. Section 2 of the *Consolidated Hearings Act* states that the Act "applies in respect of an undertaking in relation to which more than one hearing is required or may be required to be held". Ms. Hall argues that the approval under the *Ontario Water Resources Act* (OWRA) is required in order to establish the waterworks and that approval may require a hearing. An appeal from that hearing should be joined to the Joint Board hearing, or the matter referred directly to the Joint Board.
3. A class environmental assessment process approval is necessary under the *Environmental Assessment Act*. Ms. Hall argues that a class environmental assessment applies to private works and no OWRA approval will be given until the class environmental assessment process has been satisfactorily completed. Ms. Hall argues that from an environmental planning perspective all matters relating to the supply of water, its quantity and quality, sewage servicing and the impact on ground water should all be considered together.

The arguments made by Mr. Makuch on behalf of the Caledon Ratepayers' Association were as follows:

1. The withdrawal of the approval of the Draft Plan of Subdivision should be linked with the two other matters before the Joint Board under the *Consolidated Hearings Act, 1981* because there has been a fundamental change from 1978 and 1980 until 1991. Mr. Makuch said the fundamental change related to the fact that in 1978 and 1980, the Draft Plan of Subdivision approved by the Ontario Municipal Board and subsequently approved by Cabinet was based on an on-site water system. In 1991, the Development Permit appeal and Severance appeal all relate to an off-site water system located approximately 1 ¼ miles away from the 40 lot subdivision. Mr. Makuch argues that from a planning perspective you cannot deal with a severance application in isolation to the Draft Plan of Subdivision. All matters should be heard together rather than by way of a piecemeal approach. He argues that development is guiding the servicing rather than the other way around, i.e. servicing should be guiding development. Mr. Makuch argued that the standards for approval of a Draft Plan of Subdivision have changed in the last 13 years and all the parties including the public should have an opportunity to fully participate in one Joint Board hearing that addresses all the planning and environmental issues.
2. The Minister of Municipal Affairs in a letter dated October 25, 1991, refused a request on behalf of the Caledon Ratepayers' Association to refer a proposed amendment to the Caledon Official Plan to the Ontario Municipal Board. Mr. Makuch seeks an adjournment on the grounds that he wishes to pursue a Judicial Review of the Minister's decision because, he says, there are sufficient planning reasons to re-open the matter of the Land Use designation in the Official Plan.
3. The third reason argued by Mr. Makuch for an adjournment relates to the Draft Plan of Subdivision which was approved by Cabinet in 1980. Mr. Makuch says he will be seeking a declaration in the Courts that since the Draft Plan of Subdivision was approved prior to the revised 1983 *Planning Act*, that the final Draft Plan of Subdivision was not approved within a three year period and therefore the existing Draft Plan of Subdivision has lapsed. He says that Section 36(13) of the old *Planning Act* applies in this case and he wishes to pursue this argument in the Courts.

Mr. McQuaid, on behalf of the owner of the property, made the following arguments in opposition to the request for an adjournment.

1. The question of an on-site versus an off-site water supply can be adequately addressed in the two matters currently before the Joint Board, i.e. the severance appeal and the development permit appeal. He argues that in the original Ontario Municipal Board decision in 1978, and the Cabinet decision in 1980, the question of water supply related only to a communal water system and not whether it was on or off site.
2. With regard to the argument relating to withdrawal of the Draft Plan of Subdivision being brought before a joint panel, Mr. McQuaid said the Ontario Municipal Board has already refused a Section 42 review under the *Ontario Municipal Board Act* and the Minister has refused to consider any further Official Plan amendment requests. In light of these considerations it would be inappropriate to re-examine the Draft Plan of Subdivision.
3. With regard to the argument dealing with a Judicial Review of the Minister's decision relating to the refusal to refer an Official Plan amendment to the Ontario Municipal Board, Mr. McQuaid said Mr. Makuch was only retained on the argument motion before the Joint Board and the Judicial Review may or may not be proceeded with. The same argument applies to the request by Mr. Makuch to pursue a court appeal relating to the three year lapsing of the Draft Plan of Subdivision. These appeals may or may not be pursued. In any event, none of these appeals have commenced and the Joint Board should carry on with the matters before it.
4. Any additional matters that may arise during the appeal before the Joint Board, such as the necessary approvals under the OWRA, can be adequately addressed during this hearing and, if found by the Joint Board panel to be relevant, can be added as conditions to either the severance or the development approvals. In addition, any monitoring that would be required can also be addressed in the conditions. These further approvals or conditions should not be used as a delaying tactic to hold up the Joint Board hearing.
5. A class environmental assessment under the *Environmental Assessment Act* does not apply to private works. It only applies to public works. This is not a public work but a private undertaking. The Environmental Assessment Act and its regulations are the governing legislation. If the Ministry of the Environment wishes to change the

rules of the game, it should do so by amending the legislation and/or the regulations. Policy statements made by the Minister or staff of the Ministry relating to a change in procedure are only that - policy statements. You cannot do indirectly what you cannot do directly.

6. Over the last 13 years the applicant has gone through every approval process that was required. The applicant has spent a great deal of time and money to find an adequate source of water to service the 40 lot subdivision. There should be some finality to the process and it would be very unfair to the applicant for the Joint Board to grant an adjournment. Most of the significant issues have been addressed in the five days given to the argument on the adjournment and the hearing itself should only take three or four days. A further delay is neither warranted or necessary.

From the arguments presented to the Joint Board the possibility of the application of the *Environmental Assessment Act* to this project has become an issue of importance.

In February 1990, Mr. Makuch, counsel for the Caledon Ratepayers' Association, requested the Minister of the Environment to designate a part or all of the project under the *Environmental Assessment Act*. On February 20, 1990 a Notice of Motion was made to adjourn a hearing in front of a Niagara Escarpment Hearing Officer due to the fact (amongst others) that a full environmental assessment 'EA' had been requested. This hearing was adjourned.

On March 26, 1990, Mr. Makuch wrote that his request for an environmental assessment was for "the proposed subdivision and water system".

The proponent's counsel stated that the developer was quite concerned about this request because the project and its approvals were put on hold until the Minister made a decision.

On December 21, 1990 the Minister of the Environment wrote Mr. Jack Denreyer, a key member of the Caledon Ratepayers' Association, and gave a response to the request to designate under the *Environmental Assessment Act*. The Minister stated that:

I have decided not to designate the project under the *Environmental Assessment Act* for the following reasons:

- 1) The potential environmental impacts associated with this project do not warrant the preparation of an individual environmental assessment;
- 2) The subdivision proposal has been thoroughly reviewed and approved under the *Planning Act* and the *Niagara Escarpment Planning and Development Act*; and
- 3) Concerns relating to aquifer draw down and contamination will be addressed through the provisions of the *Ontario Water Resources Act*.

This response seems to be clear and unequivocal. The project is not to be designated. The Board further notes that the Minister refers to the "project", which the Board considers must refer to the "proposed subdivision and water supply system" mentioned by counsel for the Ratepayers.

However, the Ratepayers asked the Minister to reconsider her decision. This request had the effect of delaying the project once again.

On June 4, 1991, the Ministry of the Environment sent a letter to Mr. Makuch stating that:

I have decided to not change my decision.

The Minister also gave reasons for this statement.

- 1) No regulatory agency, including the Ministry of the Environment, have any outstanding environmental concerns about the proposal;
- 2) A review under the EA Act would not result in substantially different information and would be a duplication of the Niagara Escarpment Commission and Ontario Municipal Board proceedings;

3) An adequate public consultation and appeal process exists under the Planning Act 1983, and the Niagara Escarpment Planning and Development Act.

This letter also appears to be clear and unequivocal. The project will not be designated. Importantly, the Minister also states that no agency, including her own Ministry, have any outstanding environmental concerns. This is a strong statement of opinion by the Minister.

One can imagine the surprise of the developer when in mid-October 1991 a Ministry of the Environment official mentioned verbally that the project might be subject to the class environmental assessment procedures for municipal sewage and water projects. This was confirmed in writing in a letter dated October 22, 1991 from Susan Mojgani, a planner in the Environmental Assessment Branch, which stated:

The water works system required to service this subdivision is subject to the requirements of the Environmental Assessment Act, as the Town of Caledon will be assuming the works after three years. As such, it must meet the requirements of Schedule C of the MEA's Class Environmental Assessment for Municipal Sewage & Water Projects.

Therefore, in October 1991 the Ministry of Environment's position was that the developer must go through the class environmental assessment process for municipal water and sewage projects. This October 1991 position is in marked contrast to the position stated by the Minister in December 1990 and June 1991.

The developer's counsel expressed considerable concern about this change from no designation of any part of the project under the *Environmental Assessment Act* to a class environmental assessment designation of the water works system. Such a designation could result in a considerable delay, including a possible hearing under the *Environmental Assessment Act*.

Section 23, subsection 1 of the OWRA states that the "establishment of any water works" requires plans and information to be submitted for approval. The works cannot be constructed until the proposed works have been approved by the Director. It is the Joint Board's understanding that the developer applied to the Ministry of the Environment for this permit on January 16, 1991. The developer's counsel stated that the proponent had submitted all relevant studies and was under the impression that all environmental concerns had been addressed. Ms. Hall, counsel for the Ministry of the Environment, stated that to her knowledge there were no outstanding environmental concerns holding up the issuance of the OWRA permit. This echoed the Minister's statement in June 1991 that the Ministry of the Environment had no outstanding environmental concerns with the proposal.

In an affidavit dated October 21, 1991, Mr. D. Carr, a supervisor in the Ministry of the Environment's Approvals Branch stated:

From a technical standpoint, and subject to any changes made necessary by the results of the ESR, an approval probably could be issued for these works.

However, there was an interesting caveat when Mr. Carr stated that it is:

Ministry policy that the class environmental assessment process must be completed before the OWRA approval may be granted.

Based on this information it appears that all environmental issues surrounding the water works have been successfully addressed and it is just the class environmental assessment process that is holding up the issuance of the OWRA permit, from a Ministry of the Environment perspective.

The Joint Board notes that these statements in regard to the application of the class environmental assessment process to the water works system of the project were made on October 21 and October 22, 1991, only a week before the Joint Board hearing was scheduled to begin on October 28, 1991.

Counsel for the developer stated that the project has not been designated legally as being subject to the *Environmental Assessment Act* and therefore the statement from Ms. Mojgani on designation is not binding. He further requested that the Board speak to this issue and, in fact, all counsel requested that the Board speak to this issue.

It is clear to the Joint Board that if the project is subject to the *Environmental Assessment Act* that the hearing should be adjourned. The process under the class environmental assessment for municipal sewage and water projects would have to be allowed to run its course. It would also not be reasonable to hold this hearing if a second hearing could be possible under the OWRA. It would be best to hear all issues under all relevant legislation at one time.

Does the Joint Board have the jurisdiction to rule on the applicability of the *Environmental Assessment Act*, in general, and in this case specifically?

Counsel for the developer argued that the Joint Board has such jurisdiction generally and specifically. He cited the 1971 Cedarvale Tree Services case from the Ontario Court of Appeal. Its citation is Re Cedarvale Tree Services Ltd. and Labourers' International Union of North America Local 183, Ontario Reports 1971 Vol. 3, p. 832. In that decision the court held that in regards to the Labour Relations Board under the *Labour Relations Act* that:

The Board is master of its own house not only as to all questions of fact and law falling within the ambit of the jurisdiction conferred upon it by the Act, but with respect to all questions of procedure when acting within that jurisdiction.

This case appears to give that Board, and administrative tribunals generally, the power to hear issues of jurisdiction.

Furthermore, the Board now hearing the Niagara Escarpment draft plan was recently asked to decide the applicability of the *Environmental Assessment Act* to the proposed Niagara Escarpment Plan. That Board heard argument on this issue and made a decision. In that case that Board felt it had the specific

powers to hear the issue of the applicability of the *Environmental Assessment Act* to a specific plan.

This Joint Board adopts the position that it has the general and specific powers to address the issue of the applicability of the *Environmental Assessment Act* to the water works system proposed for this project.

It is important to outline certain background points in relation to the *Environmental Assessment Act*. Section 3 states that the Act applies to: "enterprises or activities or proposals, plans or programs in respect of enterprises or activities". Section 3(a) states, as the Board understands it, that the Act applies to the enterprises, etc., of government bodies, unless specifically exempted under Section 29. Conversely Section 3(b) states, as the Board understands it, that the Act does not apply to the enterprises, etc., of the private sector unless specifically designated by regulation.

There is a long-standing and well-accepted principle of the application of the *Environmental Assessment Act* and that is that government projects are subject to the Act unless exempted, private projects are not subject to the Act unless specifically designated by regulation.

Therefore, on what basis does the Ministry of the Environment state that the "water works system required to service this subdivision is subject to the requirements of the *Environmental Assessment Act*"? Counsel for the Ministry provided extensive argument on this point, with the most important point being a regulation under the *Environmental Assessment Act*.

Regulation 205/87 under the *Environmental Assessment Act* was filed on April 13, 1987. Section 5, subsection 2 of this regulation states that:

An undertaking by a municipality is exempt from the provisions of subsection 5 (1) of the Act where,

certain conditions are fulfilled. One of these conditions is outlined in subsection 5(1)(h) which is as follows:

subject to subsection (3), it is a work provided for in a subdivision agreement between a municipality and a subdivider.

Therefore, up to this point in the regulation, work provided for in a subdivision agreement is exempt. However, Section 5(3) provides for an exemption from the exemption. Section 5(3) states that:

The exemptions provided by clauses (2) (a) and (h) do not apply in respect of,

- (a) an undertaking of a type referred to in clause (4) (a)

Section 4 states:

An undertaking by any municipality, if it is an undertaking of a type,

- (a) approved under section 14 of the Act with respect to,

- (i) the class environmental assessment for municipal road projects with approval dated the 9th day of April, 1987,
- (ii) the class environmental assessment for sewage and water projects with approval dated the 9th day of April, 1987,
- (iii) the class environmental assessment for water management structures with approval dated the 12th day of December, 1985 or
- (iv) the class environmental assessment for minor transmission facilities for Ontario Hydro, with approval dated the 6th day of March, 1986,

copies of which may be found in the public records maintained under section 31 of the Act; and

- (b) that is being carried out in accordance with the procedure set out in the relevant class environmental assessment and approval and for which the procedure does not require a further approval, and for which no other environmental assessment has been submitted,

is exempt from the provision of subsections 5(1).

The Joint Board's interpretation of this convoluted regulation is that the municipal projects that follow the approved class environmental assessment procedures for roads, sewage and water works, and water management structures are exempt from Section 5(1) of the Act.

It appears to be the argument of counsel for the Ministry of the Environment that when the municipality "will be assuming the works after three years" that there is a "municipal proponentcy" and that this proponentcy makes the project subject to the class environmental assessment procedure. There was evidence presented at the hearing that the intention was for the water works to be transferred to the Region of Peel at some time after construction. In essence, the "municipal proponentcy" argument is that if the private sector plans and constructs a work that is to be turned over to a municipality this work is subject to the class environmental assessment process that was designed specifically for municipal projects.

Mr. Burnside and Mr. Morrison, who are experienced consulting engineers, both expressed considerable surprise at this interpretation of the regulation. They both stated that this was a new approach, and one that they had not seen previously. Ms. Hall suggested that this approach has been in use since the Regulation was made in 1987. However, Mr. Burnside contradicted Ms. Hall when he stated that he had been involved with at least 8 different private water works projects since 1987, where no class environmental assessment approval was required by the Ministry of the Environment.

The Board wishes to note that there may be some inconsistency in the Ministry's approach since it appears that "municipal proponentcy" is not being used to force class environmental assessment approvals for road projects or water management structures that are built by private developers, and eventually turned over to municipalities. Only waterworks are being singled out, and those only very recently.

Ms. Hall provided a memo from Mr. D. Doyle, the Director of the Environmental Assessment Branch, dated January 21, 1991. This memo stated that when sewage and water works are constructed by a private interest and turned over to a municipality these projects are subject to the

Environmental Assessment Act. This is the earliest written mention of this policy that was provided to the Board, and as stated previously this information had not found its way to the consulting engineers working on this project until very recently.

Section 5(1) of the *Environmental Assessment Act* states that: "The proponent of an undertaking to which this Act applies shall..." do a number of things, including submit an environmental assessment. Therefore, a key factor in the application of the Act is the determination of who is a proponent. Section 1(k) states that:

‘proponent’ means a person who,

- (i) carries out or proposes to carry out an undertaking, or
- (ii) is the owner or person having charge, management or control of an undertaking;

It is clear in this case that the developer proposes a development and is the owner and person in charge of the project. However, is this an undertaking to which this Act applies? Is there a regulation that applies this Act to this private proponent? Is this developer a proponent within the meaning of the *Environmental Assessment Act*?

The Board recognizes the significance of this case. The application of class environmental assessment procedures to private sector projects that will be assumed by municipalities has broad implications for all such development in the province.

In 1986 the Ontario Municipal Board, in the *Domed Stadium Case, Re City of Toronto Official Plan Amendment 333; Re Metro Toronto Domed Stadium*, 19 O.M.B.R., p. 232, was asked to rule on a case dealing with the application of the *Environmental Assessment Act* to privately planned and constructed services that would likely be turned over to a municipality at some date in the future. The situation in that case is very similar to the one under

consideration by this Joint Board. In the Domed Stadium Case the Ontario Municipal Board stated at Page 236:

The board finds that the city's role in these matters is to assure that the work is of certain quality and uniformity and in some cases to direct the sequencing of events but not to pre-empt the management and control responsibilities of the precinct developer.

As a consequence of the above finding, the board concluded that the city is not a proponent of the provision of infrastructure as defined in s. 1(k) of the Environmental Assessment Act. We further find that the proposed provision of infrastructure cannot be said to be an enterprise or activity by a municipality to which the Act applies, and therefore the obligation to submit an environmental assessment as required by s. 5 of the Environmental Assessment Act does not arise.

This ruling of the Ontario Municipal Board was upheld by the Divisional Court.

In the case before this Joint Board, the Ministry of the Environment appears to be relying on section 5(2)h of Regulation 205/87 which states that work provided for in a subdivision agreement is exempt from environmental assessment, unless it is covered by a class environmental assessment. When it is covered by a class environmental assessment, those provisions must be followed. The argument was made that this section implies that all works mentioned in a subdivision agreement are subject to the Act, or else there would be no reason to exclude them specifically.

The Joint Board finds that the "work provided for" in section 5(2)(h) applies only to the parties that are proponents under section 1(k) of the *Environmental Assessment Act*. The Board finds that Regulation 205/87 does not provide cause for the private developer to be required to follow the class environmental assessment for municipal sewage and water projects. The developer cannot be considered to be the proponent under Section 1(k) because the Act does not apply to private parties, unless by regulation. No such regulation is found here.

There is also an issue of fairness. The Doyle memo suggesting that private sewer and water projects were to be included under the *Environmental Assessment Act* was written January 21, 1991. The OWRA permit application was submitted on January 16, 1991. Information on both of these important issues would have been available to the Minister in her second review of the application to have this project subject to the *Environmental Assessment Act*. On June 4, 1991, the Minister of the Environment stated in writing that the Ministry of the Environment had no outstanding environmental concerns and that no class environmental assessment is required. It would be reasonable to assume that the class environmental assessment process concerns had been laid to rest and that the OWRA permit issuance would be routine. However, this was not to be the case. Barely one week from the start of a Joint Board hearing, the developer is told that the necessary water works are subject to a class environmental assessment. Additionally, he cannot get his OWRA permit until the class environmental assessment process is finished. Then the counsel for the Ministry, on October 28, 1991, requests an adjournment of the hearing for several reasons, one of which is the fact that a class environmental assessment is needed. The second is that the class environmental assessment process and the OWRA permit approval might both be subject to hearings in the future and that all issues should be heard together. It does not seem to be fair to the developer to provide information under Ministerial signature, that leads reasonably to a certain conclusion, and then to arbitrarily change that position at the very last minute before a Joint Board hearing is to commence.

The Joint Board is concerned that the Ministry is trying to do indirectly what the Minister has stated will not be done directly. If a private sector project is to be subject to the *Environmental Assessment Act* it must be designated directly either by an amendment to the Act or by Regulation.

Therefore, the need for the developer to follow the class environmental assessment for municipal sewage and water projects is not a basis on which to provide an adjournment. Additionally, the OWRA permit should not be held up by the Director on the basis that a class environmental assessment process must be complied with.

The Joint Board also wishes to comment on a statement made by Ms. Hall. Ms. Hall pointed out that under Section 23(1) of the OWRA there is a statement giving the Director very broad powers in requesting information from a party that is seeking a water works permit. In that section the phrase "such other information as a Director may require" is used to describe these powers. Ms. Hall suggested that this phrase was worded in a sufficiently broad fashion that it could be used to force a person requesting a permit to fulfil the requirements of a class environmental assessment indirectly.

It appears that this section does provide broad powers in regard to the requesting of information. But it seems reasonable to assume that the information requested must be of direct relevance to the issue at hand, i.e. the establishment or extension of water works. A class environmental assessment outlines not only the collection, analysis and provisions of certain types of information, it also contains a certain planning process. It is the Joint Board's finding that Section 23(1) of the OWRA cannot be used to force the provisions of a class environmental assessment for municipal water and sewage projects under a private interest.

With regard to the other arguments put forth on the adjournment request, the Joint Board generally likes to have all relevant matters before it at one hearing before one panel. The Board discourages multiplicity of proceedings. The history of this matter before the Joint Board is very long and very complicated. But the Board does acknowledge that in the last 13 years circumstances have changed and standards have been revised.

It would appear from the evidence and the arguments of counsel that in fact there has been a fundamental change. What was proposed in 1978 before the Ontario Municipal Board and in 1980 before the Cabinet was a 40 lot plan of subdivision with either on-site water or water immediately adjacent to the site. In 1991, the development permit and severance appeals relate to a pump and water supply system 1 ¼ miles away from the subdivision. From a planning and environmental perspective this is very significant. A 1 ¼ mile water system could encourage strip development along Highway 24 and the Third Line West, particularly in those places where the Niagara Escarpment

controls do not apply. The ramifications of strip development should be thoroughly examined and reviewed.

In addition, there are implications with regard to the suitability of 40 septic tank systems located on the site in relation to existing ground water. The standards for septic tanks have changed in the last ten years. There is serious planning and environmental significance relating to ground water monitoring and this issue should be looked at in terms of the Draft Plan of Subdivision not just as a condition attached to an approval for a development permit or a severance.

As well the Joint Board must look at the purpose of the proposed severance and the development permit. The purpose was to install a well and pump house and to approve a water line to service a 40 lot plan of subdivision. Planning is not done in a vacuum. The water supply system cannot be separated from the plan of subdivision. They are intertwined and all planning and environmental concerns relating to both matters should be thoroughly and adequately addressed at a full hearing before one panel.

In addition the Joint Board has serious reservations relating to the request by counsel for the Niagara Escarpment Commission and the Ministry of the Environment relating to inadequacy of notice and the unavailability of counsel to participate fully in the 13 day hearing scheduled for the Joint Board. The Joint Board acknowledges that there was some confusion with regard to the notice provisions and finds that the request for an adjournment because of lack of time to prepare for a full hearing is both reasonable and justified. The Niagara Escarpment Commission and the Ministry of the Environment have a vested interest in the outcome of this Joint Board hearing and should be allowed to participate fully in the process. The public interest dictates that all relevant planning and environmental matters be thoroughly and satisfactorily addressed.

DECISION

In the result and for the reasons previously mentioned,

- (1) The motion for adjournment is granted;
- (2) The Joint Board hearing on the severance and development permit appeals is adjourned sine die pending the following:
 - (i) Withdrawal of the approval of the Draft Plan of Subdivision will be linked to the development permit and the severance appeals and heard before a joint panel under the Consolidated Hearings Act.
 - (ii) The Ontario Water Resources Act process must be completed. If appeals are launched these appeals will also be heard by the Joint Board.
 - (iii) New notices will be necessary.
 - (iv) The parties are encouraged to seek a pre-hearing conference before the matter comes back before the Joint Board.

The Joint Board may be spoken to if any problems arise.

ISSUED at **TORONTO** this **17th** day of **DECEMBER, 1991.**

"M.A. Rosenberg, Q.C."

M.A. Rosenberg, Q.C.
Chairman

"Dr. P.F.J. Eagles"

Dr. P.J.F. Eagles
Member

CA20NCH 91C16

Ontario. Consolidated Hearings Act, 1981.

CH-90-16

LAWREN GROUP INC. DECISION AND REASONS FOR DE
THE MATTER OF TWO APPEALS, ONE BY THE NIAGARA

**RESOURCE CENTRE
INST. FOR ENVIRON'L. STUDIES
UNIVERSITY OF TORONTO**



